

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826



**SUSAN LAPSLEY**  
Director

December 31, 2009

**REVISED 1/28/2010**<sup>1</sup>

Ms. Ana Matosantos, Director  
Department of Finance  
State Capitol, Room 1145  
Sacramento, California 95814

Dear Ms. Matosantos:

This letter constitutes the report required by the Financial Integrity and State Manager's Accountability Act of 1983 (FISMA) concerning the adequacy of the systems of internal accounting and administrative control in use by the Office of Administrative Law (OAL).

OAL's Function

The Office of Administrative Law is a small agency with 20 employees. OAL's main function is reviewing administrative regulations proposed by over 200 state agencies to assess whether they comply with legal and procedural standards established by the Administrative Procedure Act (APA). OAL transmits approved regulations to the Secretary of State, and issues written opinions regarding disapproved regulations. OAL is responsible for compiling and publishing the California Code of Regulations (CCR). We also publish the California Regulatory Notice Register, a weekly bulletin containing notices of proposed regulatory action by state agencies, as well as other notices of general public interest. Pursuant to Government Code sections 11344 and 11344.1, OAL makes the CCR and Notice Register available on the Internet, free of charge.

In addition, OAL assists state regulatory agencies through a formal training program, as well as through less formal methods, to understand and comply with the APA. Through its Reference Attorney service, OAL provides direct legal advice to state agencies and members of the public regarding California rulemaking law.

In response to petitions submitted by interested persons, OAL evaluates whether rules being used by state agencies constitute "underground regulations" which have not been properly adopted pursuant to the requirements of the APA. We issue formal determinations reflecting those evaluations.

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<sup>1</sup> This document was revised pursuant to instructions received January 21, 2010 from the Department of Finance, Office of State Audits and Evaluations (DOF-OSAE). DOF-OSAE instructed OAL to add a description of how the risk assessment was performed, a statement regarding compliance with Government Code section 12439 and a conclusion on the adequacy of internal controls.

### Risk Assessment

Because OAL is a small agency with a collegial staff of attorneys and legal analysts, OAL's executive team uses a hands-on, direct communication approach toward management. We do not have an internal auditor. Our risk assessment was performed by engaging in a series of informal but comprehensive discussions of risks that could potentially affect our ability to perform our core mission. After conducting the assessment, we identified the following eight issues as representing the most significant risks facing our agency. Our assessment of each risk and our plans for addressing each risk are discussed in depth below, in the section titled "Evaluation of Risks and Controls."

1. Budget reductions
2. Maintaining adequate staffing levels
3. Information technology costs
4. Retention of experienced staff
5. Succession planning
6. Litigation
7. Consistent application of internal control protocols
8. Key person dependency

### Evaluation of Risks and Controls

1. **Budget Reductions:** OAL has been severely impacted by budget cuts. Since its creation over 25 years ago, OAL historically has averaged 34 positions (from a high of 58.5 staff positions in 1985). However, beginning with budget cuts in the early 1990's, OAL has taken severe and arguably disproportionate cuts in staff with no corresponding reduction in workload. Until recently, OAL had 21 positions but we were forced to eliminate one attorney position to cope with new reductions stemming from the current economic crisis. OAL also kept a vacant attorney position open to achieve salary savings, despite significant workload pressure. As an understaffed agency with only 20 employees and an extremely lean budget, the loss of one attorney position and the reduction in our allocation have severely impacted our ability to fulfill our statutory responsibilities.

OAL has no discretionary functions that can be eliminated to reduce spending to meet reductions.<sup>2</sup> Virtually all significant expenditures made by OAL involve spending which cannot be reduced or avoided, such as costs for inter-agency agreements with the Department of General Services for fiscal services and human resources services, an inter-agency

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<sup>2</sup> The sole function of OAL which may be considered to be discretionary from a statutory perspective is our review of alleged "underground regulations" (rules imposed by state agencies that have not been properly adopted pursuant to the APA and that are not subject to an express statutory exemption from the APA's requirements). Government Code section 11340.5 states that OAL "may" accept petitions from the public challenging such rules. Although in theory this function is discretionary, the Legislature authorized two new attorneys in the 2005 Budget specifically for OAL to resume investigating challenged rules. The Legislature subsequently requested OAL to report information concerning OAL's investigation of underground regulations. Accordingly our view is that the Legislature expects and requires OAL to conduct this function.

agreement with the Office of Technology Services for information technology services, and expenses such as rent, salaries and staff benefits. We have reduced or eliminated spending on office supplies and equipment, but certain purchases are unavoidable. OAL's budget was lean before rounds of budget cuts over two fiscal years. These reductions threaten our ability to perform our core mission. Any continuation of this persistent underfunding/understaffing is clearly the most serious challenge facing our agency. To minimize this risk, we have worked closely with our Department of Finance budget analyst to request additional staff and to provide detailed and complete information regarding our workload and financial challenges in fulfilling our statutory responsibilities.

2. **Maintaining Adequate Staffing Levels:** OAL has seen a steady increase in recent calendar years in the number of proposed regulation files submitted for review. Accordingly, the number of workload hours has increased. We expect the increased workload trend to significantly intensify due to AB 32, the California Global Warming Solutions Act of 2006. AB 32 established a first-in-the-world comprehensive program of regulatory and market mechanisms to achieve reductions of greenhouse gases. Regulations proposed by state agencies to implement AB 32 must be reviewed by OAL for compliance with the APA. Although AB 32 most significantly affects the Air Resources Board, it has a wide reaching effect, requiring other state agencies to implement new or change current regulations. Our requests for training on the rulemaking process have increased as those other agencies engage in the rulemakings required to implement AB 32.

Additionally, in 2005 the Legislature approved two attorney positions so that OAL could resume reviewing petitions challenging purportedly illegal rules ("underground regulations") issued by state agencies. OAL has received an increasing number of petitions each year: 48 in 2006, 63 in 2007, 117 in 2008, and 112 in 2009. The review of an underground regulation petition requires a comprehensive legal analysis of all applicable statutes, regulations and case law, and all documents relevant to the challenged rule. With only two attorneys assigned to the underground regulations unit, OAL management must carefully assess whether to accept or decline any petition submitted for review.

It is essential for OAL management to maintain adequate staffing levels to sustain our core mission, which in the face of budget reductions, is one of our most significant challenges. To minimize this risk, we have asked for staff additions to ensure that we will be able to meet our statutory obligations. Absent additions to staff, we must rely heavily upon retired annuitants to complete our workload.

3. **Increasing Information Technology Costs:** OAL has experienced a steep increase in its expenditures for information technology (IT). OAL has no IT staff and contracts with the state data center to provide our internet connection and host all applications remotely. We contract with a private vendor to provide on-site support because the state data center does not provide OAL with on-site support. Additionally, OAL's IT equipment is aging and we do not have funding for new equipment purchases.

The increase in IT costs is largely attributable to increased charges by the state Office of Technology Services (O-Tech). We have worked to rein in these costs to the extent possible. As noted in our 2007 FISMA report, AB 1302 (Chapter 713 of 2006) requires OAL to post all emergency regulations proposed to be adopted by state agencies on our website immediately after the regulations have been submitted to OAL for review. To reduce our state data center bill for webmaster services, we trained existing OAL staff to serve as webmasters and now do website updates in-house. O-Tech also provides our internet connection and hosts our applications on servers owned and maintained by O-Tech. The costs associated with these services have increased dramatically for the following reason: Although initially O-Tech charged OAL a nominal fee for these services in exchange for OAL's help in testing O-Tech's new server-based computing services program, the test period has ended and OAL is now responsible for the full cost of the services. These are new costs for OAL which are unavoidable and must be carefully monitored.

OAL's IT equipment is aging and we do not have funding available for equipment purchases. OAL uses personal computers (PC's) to produce documents, conduct online research, enter data into the OAL database, and to perform other tasks integral to OAL's core mission of regulation review. Based on an estimated PC lifecycle of 3 to 5 years, OAL had planned to replace its PC's in April 2010, however no funding is available to replace PC's. Our copiers and printers are also well along in their anticipated lifecycles. Because we have been forced to zero out any proposed spending on equipment, one of our key challenges is the potential for equipment failure with no funds available for equipment replacement or repair. To minimize this risk, we have worked to provide our Department of Finance budget analyst with detailed information about our equipment needs. Because we have been unable to secure funding for equipment replacement due to the economic conditions facing California, we continue to monitor equipment performance closely.

Our 2007 FISMA report discussed challenges associated with the impending modernization of OAL's outmoded legacy database. OAL purchased an off-the-shelf law office management software product and had it customized for our use. The conversion to that new database is now complete. As in any database conversion, transitioning our staff to a new database with far greater functionality posed challenges, but we worked to provide staff with adequate information, training and support during the transition process. We planned ahead to secure a multi-year maintenance and support agreement from the software creator at an affordable cost.

4. **Retention of Experienced Staff:** As discussed above, OAL was forced to eliminate one attorney position as a result of the budget shortfall, and to keep one vacant position open to generate salary savings. Of our existing 20 full-time staff positions, 13 are attorneys. OAL management is concerned with retaining experienced and knowledgeable staffing. This can be challenging at times given that out of the 13 attorney positions, we have no Staff Counsel IV positions, and therefore no real upward mobility. Accordingly, openings in other state agencies may be attractive to our attorneys or support staff (particularly promotional opportunities with other agencies). We are taking all feasible steps available to us to retain

our existing staff by providing an outstanding working environment. Nevertheless, we remain very concerned about the costs associated with filling vacancies. To minimize this risk, we have registered to use the HR-Modernization program implemented by the Department of Personnel Administration as an economical means of conducting examinations for staff counsel and staff counsel III in the event we experience turnover in the attorney positions.

5. **Succession Planning:** Three of OAL's most experienced attorneys have retired in recent years, and we anticipate that this trend will continue as we have five attorneys with more than twenty years service with OAL. We engage our staff in discussions about retirement in an effort to get advance notice for planning purposes. We have also begun identifying what internal staffing changes can and will need to be made. OAL has an informal but well-established process for sharing historical and subject matter knowledge within the office. In order to preserve historical and subject matter knowledge and enhance consistency in our review of proposed regulations and underground regulation petitions, we developed a binder of resource materials for OAL attorneys and a guide for OAL's front office staff. OAL's executive team has also begun planning for the transition to a new administration so that a change in management can be smoothly implemented.
6. **Litigation:** OAL is occasionally named as a defendant when plaintiffs sue state agencies over rules which have been adopted pursuant to the Administrative Procedure Act. Typically, OAL seeks dismissal from such lawsuits because our role is limited to reviewing and publishing such rules, but at times we are not dismissed. Additionally, we are currently engaged in litigation brought by a plaintiff who disagreed with a determination we issued regarding an alleged "underground regulation." (The trial court ruled in favor of OAL but the plaintiff appealed the trial court ruling.) We may face similar litigation in the future. To minimize this risk, it is the policy of OAL management to be diligent in protecting our agency from liability by immediately obtaining representation from the state Department of Justice, by fully participating in the progress of the case, and by working cooperatively with counsel representing any other state agency defendants to ensure an appropriate outcome.
7. **Consistent application of internal control protocols:** Pursuant to recommendations of DOF-OSAE issued in December 2005, OAL management reviewed and adjusted its internal control protocols to improve record keeping procedures for our business functions. Specifically, we created written procedures and trained staff to ensure that amounts due OAL are tracked, collected, and deposited in a timely manner. We have been successful in improving our record-keeping and collection efforts, however we continue to make regular assessments of the integrity of our internal protocols to ensure consistent application.
8. **Key Person Dependency:** OAL is a small agency of 20 employees with a single administrative assistant. As a result of these conditions, some degree of key person dependency is unavoidable. We have taken steps to curtail key person dependency by establishing written procedures for the administrative assistant's key business functions, and by having additional staff trained and available to assist in procurement of office supplies.

Vacant Positions

We have reviewed our records for fiscal years 2007-08 and 2008-09 and determined our office is in compliance with Government Code section 12439.

Conclusion

I affirm that OAL has established adequate internal controls addressing the risks we have identified. OAL's management team is committed to the highest standard of full compliance with our statutory obligations. Any questions concerning this report may be directed to OAL Deputy Director Linda C. Brown at (916) 323-8915 (email [lbrown@oal.ca.gov](mailto:lbrown@oal.ca.gov)).

Sincerely,



SUSAN LAPSLEY  
Director

Copy: Governor Arnold Schwarzenegger  
Senate President Pro Tempore  
Senate Republican Leader  
Speaker of the Assembly  
Assembly Republican Leader  
Bureau of State Audits  
State Library  
Todd Jerue, Program Budget Manager  
Kristin Shelton, Principal Program Budget Analyst  
Audrey Bazos, Budget Analyst  
David Botelho, Chief, DOF-OSAE